No. 12,736

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GLOBE WIRELESS LTD.,
Respondent.

Brief for Respondent Globe Wireless Ltd.

On Petition for Enforcement of an Order of the National Labor Relations Board

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GREGORY A. HARRISON,
RICHARD ERNST,
MALCOLM T. DUNGAN,
BROBECK, PHLEGER & HARRISON,
111 Sutter Street, Room 1100,
San Francisco 4, California,
Telephone: SUtter 1-0666,
Attorneys for Respondent.

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PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

TABLE OF CONTENTS

APPENDIX

STATUTES

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STATEMENT OF THE CASE

The Administrative Proceedings

HE CHARGES AND COMPLAINT.

Nineteen charges were filed with the National Labor Relations Board in the names of 19 individuals by their labor organization.[1] Each alleged that respondent had engaged

[1]The Board refused to take evidence that the charges were so led and struck from respondent's answer the defenses raising this ssue. Respondent has applied to this Court for leave to adduce dditional evidence proving this fact and has offered so to prove n connection with its application (R. 449, 458).

in unfair labor practices within the meaning of Section 8(a)(1) and Section 8(a)(3) of the Act[2] in that "on or about January 22, 1949" respondent "discharged" the individual named because of his participation in a strike (R. 5-8). Although the Board was forbidden by Section 9(f), (g) and (h) of the Act from taking any action on such charges, it purported to issue a complaint and commence a proceeding (R. 8-13).[3]

This complaint alleged that respondent had violated Section 8(a)(3) of the Act by discharging and refusing to reinstate the employees involved herein because of membership in the American Communications Association, a labor organization (hereinafter referred to as the "ACA") and because they were engaged in activities on behalf of the ACA. The complaint further alleged that these same facts constituted an unfair labor practice under Section 8(a)(1). These allegations fully cover the unfair labor practices referred to in the charge. The complaint also alleged that another unfair labor practice, not referred to in the charge, had been committed by virtue of threats of discharge or demotion as a penalty for activity on behalf of ACA (R. 10, 12; paragraphs II, VII).[4]

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[2]By "the Act" we refer to the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. §§ 151 et seq. We shall cite it throughout simply by the section number of the Act, omitting Code section numbers.

[3]Respondent urges that the Board has no jurisdiction to issue an order on the basis of such a proceeding (R. 472). The objection to the Board's jurisdiction has been saved throughout (R. 20—Answer to complaint; R. 61—Exceptions to Intermediate Report; R. 449—Motion to Adduce Evidence; R. 472—Answer to petition here).

[4]Respondent urges that it was error to give any consideration to this alleged unfair labor practice (R. 473-474).

Respondent, after being served with the complaint, sought to follow usual discovery methods under the Federal Rules of Civil Procedure and to obtain subpoenas ancillary thereto, duly applying therefor as provided in Section 11(1) of the Act (R. 103-119). Respondent was denied the use of discovery both before trial (R. 120, 122) and when request therefor was renewed at the commencement of the hearing (R. 99-102).[5]

Respondent filed its answer and four of its defenses were stricken (R. 125-27). During the hearing these rulings were in substance repeated when evidence relating to them was excluded.[6] (R. 184-186, 200-204, 240-241, 277-278, 341, 400, 402, 425-427)

THE INTERMEDIATE REPORT.

The Trial Examiner who heard the testimony and observed the witnesses issued an intermediate report (R. 24 et seq.) holding that respondent had engaged in no unfair labor practice. He found that the persons involved in this petition had gone on strike to obtain the reemployment of Jones, an employee lawfully discharged for cause (R. 39). He found that respondent was therefore entitled to replace these employees at any time while on strike because theirs was an "economic strike." He further found: "It is clear

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[5]Respondent asserts it was denied due process in this and other ways (R. 473-475). Its request was renewed by exceptions to the Trial Examiner's report (R. 61) placing the issues before the Board, and by application in this Court for the taking of additional evidence (R. 456-57).

[6]Respondent urges this to be error (R. 473, 479-484). The necessary exceptions were taken to the Trial Examiner's report (R. 61) to place the issues before the Board. Respondent has applied to this Court for leave to take additional evidence and has made appropriate offers of proof (R. 481-484). These actions establish respondent's right to make the facts a part of the record here (R. 449, 456-60). From time to time hereinafter we shall refer to facts that were excluded by virtue of such rulings.

that any or all of them could have had their jobs back at any time before they were filled by new employees. It is not in dispute that the strike is still in effect, that there has been no request for reinstatement following the strike, and that respondent has filled the strikers' jobs with other and permanent employees." (R. 39). He also found that Leo Bash, chief operator of respondent in charge of 32 employees (R. 417), had made certain statements regarding the ACA and that none of them constituted or implied "a threat of reprisal or force or promise of benefit" (R. 42). On the basis of this finding as to the character and effect of the statements, he necessarily concluded, under Section 8(c) of the Act, that these statements did not constitute, and were not evidence of, any unfair labor practice.

The Board's general counsel filed exceptions to findings of the Trial Examiner (R. 63, et seq.). He excepted to the finding that "any or all of the charging parties could have had their jobs back at any time before they were filled by new employees" solely on the ground that they "could only have [had] their jobs back if they abandoned their rights under the Act" to refuse to work until Jones was reinstated (R. 75). The general counsel also excepted to the Trial Examiner's finding that Bash's statements neither constituted nor implied any threat of reprisal or force or promise of benefit (R. 76).

THE BOARD'S DECISION.

Thereafter the Board issued its decision and order (R. 78 et seq.). It reversed these two findings of the Trial Examiner and based its order on these reversals (R. 81-85, 91-93).

The Board agreed, with respect to the strike action, that the strike was an economic strike, and that respondent was free to replace the strikers at any time prior to their unconditional request for reinstatement (R. 84). This holding sustained respondent's right to condition the return of the strikers on their abandoning the demand that Jones be reemployed and so disposed of the general counsel's exception to the finding that the employees could have had their jobs back at any time. Nevertheless the Board went beyond the exception and reversed that finding. It concluded that the strikers, in addition to being told they were discharged, were deprived of any possibility of having their jobs back before they were replaced by new employees (R. 84, 85). On the basis of this reversal of the Trial Examiner's finding, the Board concluded that respondent had violated Sections 8(a)(1) and 8(a)(3).[7] The Board made no finding even suggesting that the alleged discharges caused or prolonged the strike, or indeed that the unfair practice, if such it was, had any effect whatever on the strikers. The Board also rejected or ignored alternative defenses of respondent, some of which asserted that under all the circumstances respondent could have refused to reemploy the strikers if it had so desired.[8]

The Board also reversed the Trial Examiner's findings as to the character and effect of Bash's statements although the Trial Examiner had heard the testimony and observed the witnesses. The Board's reversal was based solely on

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[7]Respondent urges that this reversal is not supported by substantial evidence on the record considered as a whole and should be set aside for this reason and because the Board had no authority to review this finding (R. 474, 475-476, 478).

[8]Respondent urges that this error requires denial of enforcement (R. 479-80).

abstract consideration of the statements as if they were violative of the law *per se* and without consideration of the background and the record as a whole.[9]

THE BOARD'S ORDER.

The Board's affirmative order is unusual because it is hypothetical. The Board conceded that it could not find that the strike had been abandoned or that the strikers had ever been denied or had ever even unconditionally requested reinstatement (R. 93). Nevertheless it ordered reinstatement with back pay, reinstatement to be made if the strike had been or should be abandoned and with back pay for the period between any such abandonment and until reinstatement by respondent (R. 92-93).[10] There is no evidence that the strike has ever been abandoned or that respondent has ever refused to reinstate any of the strikers. On the other hand, the record clearly shows that while the strikers were refusing to return to available work, their jobs were filled by new permanent employees (R. 39).

The Board's order further provides that respondent cease and desist from in any manner violating Sections 8(a)(1) and 8(a)(3) of the Act (R. 92-94). This blanket omnibus injunction is without basis in the complaint, the record, or the Board's findings; in contrast, respondent was denied the opportunity to present its defenses to such possible conclusions.[11]

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[9]Thus, the Board based its reversal in each case upon a citation of Board cases rather than upon consideration of the facts in the record (R. 82-83). Respondent urges this was error (R. 474, 476-477, 479).

[10]Respondent urges such an order is unlawful and should not be enforced (R. 475, 477-478, 479).

[11]Respondent urges that this form of order would be erroneous even if the other errors did not exist (R. 474, 475, 456-477, 479-481).

The Facts Before This Court

The findings and conclusions of the Trial Examiner and he Board, the relevant evidence in the record, and the acts covered by respondent's application for leave to adduce additional evidence and its offer of proof may be summarized as follows:

. THE STRIKE ACTION.

. The Afternoon Watch.

On January 21, 1949 respondent discharged Charles E. ones for insubordination.[12] Jones was employed as an perator in respondent's San Francisco operating room here respondent was engaged in the transmission of international radio communications. Jones was a member of ie ACA and reported his discharge to a meeting of that nion held at 1:30 P.M. of that day for members working n the 4:00 P.M. to midnight watch (hereinafter referred o as the "afternoon watch") (R. 34, 148-149). At this meetng the members voted to protest the discharge of Jones y having spokesmen enter the operating room during orking hours and having all members of the ACA leave ieir work in concert and refuse to work until Jones was eemployed, and thereby to prevent the transmission of international radio messages until respondent agreed to reinploy Jones (R. 187-88). Accordingly, Jones and Parks alked into the operating room at approximately 4:30 P.M. 'arks spoke to Bash demanding reinstatement of Jones. Bash replied that he himself had not discharged Jones, but iat it had been done by higher supervision. The ACA perators then on duty[13] gathered around Bash. He re-

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[12]The Board found this was lawful (R. 83).

[13]Namely, Hinde, Niemi, Pottle, Risley, Smith and Williams.

peatedly and emphatically ordered them to return to their work (R. 195, 196, 202, 208, 229, 360). All said they would not do so until Jones was returned to work (R. 242). They also asked to have a meeting with those responsible for the discharge, since, as they knew, Bash could not effect reinstatement. Bash indicated they could follow their usual practice of calling McPherson, the District Manager, or the Vice President regarding any grievance (R. 168-72, 184-85). In fact, he specifically told them that they should see the Vice President (R. 203). He also offered them the use of the telephone to request a meeting (R. 257, 361). They failed to accept these invitations and continued to demand that Bash reemploy Jones. About a half-hour later Bash received specific instructions to repeat the order to return to work. He thereupon asked each of the operators to return to his circuit (R. 34, 35, 154, 155, 362, 366). Each replied in substance that he would do so only when Jones was reinstated (R. 35, 155, 209, 230, 233, 256, 365). Thereupon Bash told them that they were fired.

This group of strikers then first chose to call upon higher supervision. They walked across the hall to McPherson's outer office and obtained an immediate meeting with McPherson (R. 218-219, 230, 247). They stated that they understood that they had been fired. McPherson confirmed this, stating that this was because they had given an ultimatum they would not work (R. 248, 421). At the same time he offered them the opportunity to return to work and sought to persuade the group as a group to return to work and to explain why Jones was discharged. McPherson repeated the request that the group return to their jobs (R. 422). Pottle, speaking for the group, carried on at some

length[14] demanding that Jones be reinstated as a condition to their returning to work and insisting that Bash be discharged (R. 198, 209). McPherson again told them that their jobs were available and were there for them and that they should go back to work, and that if they were going to remain there and refuse to work he would have no alternative but to fire them (R. 422, 423). They again refused to work and McPherson again said that the Jones case should not affect their work and that he could not accede to their demand for the discharge of Bash and asked them to go back to work and man the circuits (R. 395, 398, 428). At this time spokesmen for the employees asked for their pay checks (R. 210, 232). McPherson replied that their pay checks would be sent to them in the mail within a few days. They thereupon left the premises.

2. The Midnight Watch.

Another meeting of the ACA was held at 8:00 P.M. on January 21. It was attended by members of the midnight watch (the watch from midnight to 8:00 A.M.). Most of the strikers on the afternoon watch were also present. There was a full discussion of what had occurred during the afternoon watch (R. 298, 299). It was decided that the action of the afternoon watch should be repeated during the midnight watch (R. 288-89). Bash had previously talked to several of the employees about their coming to work and they had assured him that they would come to work as usual or would let him know. Nevertheless, they gave no indication to respondent that they would not work out their

[14]Disinterested spectators said she was "hollering and screaming" (R. 395) and "talking very loud" (R. 398).

shifts as usual that night and reported and went to work as usual (R. 290, 367).

In accordance with the decision of the ACA meeting, Parks and Hinde entered the operating room during the midnight watch shortly after those who had manned the circuits on the preceding watch had left for home. Parks again demanded that Jones be returned to work and Bash repeated that this was out of his hands (R. 284). All of the operators then at work[15] deserted their circuits and joined Parks (R. 282, 293, 301, 368-370). They stated that their purpose in this was to gain an audience with someone who could reinstate Jones (R. 233, 235), although all agreed that it was unexpected that even Bash would be there that night and all knew that no one would be there to discuss the grievance. They further made it clear that none of them would return to work until Jones was reinstated (R. 36). Bash had Parks and Hinde ejected from the premises. The other workers sat around the operating room for about an hour, as had the group in the afternoon. When it became clear that they would not work, Bash told them they were fired and to leave the premises. They did so (R. 367-70).

3. Guerrero, Wheeler and Friend.

In addition to the 16 strikers referred to above three others are involved in this case, namely, Paul Guerrero, Leslie Wheeler and Lillie Friend.

Guerrero: Paul Guerrero was not due to report to work on Saturday, June 22, but was due Monday morning at

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[15]Namely, Conger, Gyuresik, Kelso, Leach, Mulligan, McLin, Pena, Rosengren, Sheaffer (R. 293).

3:00 A.M. On Saturday evening he had a friend telephone respondent that he would not report for work on Sunday because of illness (R. 36, 344, 345). After Bash learned that Guerrero was not at work on Sunday, he telephoned Guerrero and asked him the reason for his absence. When Guerrero said he had a cold, Bash said he did not sound sick and did not think he really was sick. Bash then told him to come down to the office and that he would be immediately sent home if he was sick. When he refused to do so, he was told to get a doctor's certificate to cover himself (R. 375, 376). The Trial Examiner found that Guerrero's testimony that he was sick was not credible (R. 37). Guerrero did not come in on Sunday, but reported on Monday morning. Bash asked him if he had the doctor's certificate and Guerrero replied that he did not (R. 36, 37, 347, 348, 378). Bash then told him that he was fired and continued, "I know you are going to make me reinstate Chuck Jones, now get down there on the bricks with the rest of them and make me do it"[16] (R. 89, 90, 348, 378, 379, 389).

Wheeler: Wheeler was off on Friday night and Saturday evening and was due to work at midnight Sunday evening. Earlier in the evening, Bash called him to assure him his job was there and to find out if he was coming to work as usual. Wheeler promised to come in (R. 37, 38, 374). He failed to do so. Instead, he came in around eight o'clock Monday morning, when he was not due to work. He was with Guerrero, and Bash talked to the two of them at the same time. He asked Wheeler why he had not come in. Wheeler gave no explanation; Bash then told him that he

[16]The phrase "on the bricks" means "on the picket line."

was discharged for not reporting to work (R. 37, 38, 319). Bash said to him and Gurrero, "I know you are going to make me reinstate Chuck Jones, now get down there on the bricks with the rest of them and make me do it" (R. 378, 379, 389).

Friend: Friend was not scheduled to work on January 21 or 22. Bash called her on the telephone on Sunday night and made it clear to her that her job was there and that he wanted her to come in to work as usual on Monday morning, and she indicated she would. When she arrived she met Guerrero and Wheeler and came into the operating room with them. Bash was apparently very excited and "in a very angry mood" (R. 309); he talked to the three of them for some time. He told Friend that her job was there and that she should go to work (R. 310). There was some discussion and Bash again ordered her to go to work. She did not do so, and Bash said, "Well, trot along then" (R. 311).

Friend, Guerrero and Wheeler went out and joined the picket line.

4. Subsequent Events.

The strikers established a picket line at respondent's office on Monday morning. During the day, Guerrero and Wheeler received telegrams asking them to come to respondent's office and discuss their discharges with the District Manager and telling them that they would be reinstated if there was no basis for discharge. Both ignored the invitation (R. 38, 320-21, 349-50).

On Monday or Tuesday respondent sent each of the strikers a paycheck covering all time worked including

accrued vacation pay. Under the terms of the old agreement with the ACA, which respondent had advised would be continued in effect, such payment was required on every termination of employment (as in case of furlough, layoff, quit, leaving by mutual consent) except only unilateral discharge by the employer. In the latter case a person was required to receive two weeks pay in lieu of two weeks notice. Jones, in contrast to the strikers, received two weeks pay in lieu of notice of discharge.[17]

Respondent met during this week with a committee of the San Francisco CIO Council and officials of the ACA, who represented the strikers (R. 426). They demanded that respondent recognize the ACA as exclusive collective bargaining representative of its employees, and that respondent reemploy Jones. These demands set the conditions under which the strikers would return to work (R. 461-464). At the same time, these representatives admitted that the ACA did not represent the majority of the Globe employees in the appropriate unit covering these workers; hence, respondent could not have lawfully acceded to the demands that the strikers were making (R. 427).

The strikers distributed bulletins on the picket line during this week stating that Jones had been discharged and

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[17]Each employee received a notice stating: "In view of the termination of your employment, we hand you final paycheck covering salary through January 22, 1949. This check also includes any accrued vacation pay."

Such payment was required by California law. Section 209 of the California Labor Code provides: "In the event of any strike, the unpaid wages earned by striking employees shall become due and payable on the next regular pay day, and the payment or settlement thereof shall include all amounts due the striking employees without abatement or reduction. The employer shall return to each striking employee any deposit, money, or other guaranty required by him from the employee for the faithful performance of the duties of the employment."

that they had been locked out. They also stated that they were discussing with the management a basis for the return of all strikers to their jobs (R. 464, 465).[18]

Respondent subsequently filled their jobs with new permanent employees, while the strike continued without any unconditional request for reinstatement being made (R. 39, 93).

5. The Crucial Findings in Issue.

On the basis of the foregoing facts, respondent asserts that the finding of the Trial Examiner with respect to these strikers is the only possible finding supported by substantial evidence on the record considered as a whole. The Trial Examiner found and concluded: "* * * the strike of the other employees in protest (to the discharge of Jones) was not an unfair labor practice strike. It is clear that any or all of them could have had their jobs back at any time before they were filled by new employees. It is not in dispute that the strike is still in effect, that there has been no request for reinstatement following the strike, and that respondent has filled the strikers' jobs with other and permanent employees. In these circumstances and under familiar decisions of the Board respondent is not obligated now to reinstate the strikers" (R. 39).

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[18]Respondent dealt with the strikers only as a group; it carefully avoided any direct dealings with individual strikers to get them to disassociate themselves from the striking group. Any such action would have been an unfair labor practice. The Board apparently concluded that respondent's failure to solicit individual strikers to return to work meant that the strikers could not have returned (R. 85). The facts are quite the contrary: it meant merely that respondent was complying with the law in not endeavoring to break the strike through interference in its continuance.

The Board reached a contrary conclusion. As explained n its Opening Brief (O.B. 11, n. 15), the Board's contrary onclusion depends on its finding: "As the respondent did ot attempt to settle the strike or solicit the return of the trikers, we find no basis for concluding, as did the Trial Examiner, that 'any or all of them could have had their obs back at any time before they were filled by new employees'" (R. 85n).[19]

Respondent urges that this finding is without substantial upporting evidence in the record considered as a whole nd that, since the finding of the Trial Examiner is the only awful and supported finding on this point, there is no finding to support any order of reinstatement or back pay.

The Alternative Defenses Regarding the Strikers.

) THE STRIKERS' OBLIGATIONS TO WORK.

Respondent interposed an alternative defense that reinstatement and back pay are contrary to law because the trikers were under obligations to continue at work at the me and place they chose to refuse to do so in order to orce the reemployment of Jones.[20] The Board agreed that

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[19]Note that this purported "finding" is supported by no reference to any evidence; that no issue had been raised concerning ettlement or solicitation to return; that solicitation would have een an unfair labor practice; that Guerrero and Wheeler, whose atus was in doubt to the Company, were specifically invited to iscuss their return to work; that settlement negotiations were in ct under way; that the Trial Examiner found on the basis of the vidence that the jobs were open.

[20]Respondent does not urge that its employees have no right to rike. It concedes this right. However, it urges that law imposes rtain obligations upon its employees upon their voluntarily takg over a watch. The public interest requires that they stand the atch and transmit messages so that, absent notice to the contrary, he public will get the service upon which it relies. These obligations re violated when they engage in quickie wild cat intermittent work oppages such as those carried on by the strikers involved in this roceeding.

Section 201 of the Federal Communications Act imposes an obligation on respondent to furnish service; as a common carrier in interstate and foreign commerce it must furnish radio communication service upon reasonable request (R. 86). However, the Board held that this obligation in no way extends to respondent's employees and that refusal to work by its employees does not result in any breach of duty on the part of respondent (R. 86).

But this statute specifically provides that an omission or failure of its employees is an omission or failure of respondent. Thus Section 217 provides:

> "The act, omission or failure of any * * * person * * * employed by any common carrier * * * acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier * * *."

This is further implemented by a direct sanction imposed upon the employees implementing respondent's responsibility for the results of their acts. Thus Section 501 provides that "any person who willfully and knowingly *does or causes or suffers to be done* any act, matter or thing in this Act prohibited or declared to be unlawful" is guilty of a felony.

An obligation upon each striker to have worked out the watch that he took over is also imposed by the state law. The California Penal Code, Section 638, provides:

> "Every agent, operator, or employee of any telegraph or telephone office, who wilfully refuses or neglects to send any message received at such office for transmission * * * is guilty of a misdemeanor."

The common law of public utilities requires a utility, and the workers engaged in its essential activity, to provide service to the public. E.g., *United Gas Co. v. R. R. Comm'n*, 278 U.S. 300 (1929). Respondent urges that this obligation includes the obligation to continue to supply this service until reasonable notice is given to the public that it will not be available and urges that this requires persons engaged in these services to carry on their work until the public, which relies upon the workers to provide the service, has been given reasonable and adequate notice that service will not be available as usual.

Respondent's employees had worked under a collective bargaining agreement, including a no-strike clause (R. 325). They had continued to work under an understanding that the terms of this agreement would govern their work (R. 11-13). They had specifically recognized that a precipitous work stoppage during which the circuits were not adequately manned was a violation of their contract of employment (R. 325). The employer established nondiscriminatory rules forbidding desertion of work (R. 412).

The Board denied that these workers' right to reinstatement and back pay was at all affected by the provisions of law and contract referred to (R. 85-86) refusing to give any consideration to the differences between the work of these employees and of others.

(b) OTHER ATTACKS ON THE AFFIRMATIVE ORDER FOR REINSTATEMENT WITH BACK PAY.

Respondent interposed a defense and sought to introduce evidence to show that any affirmative order would not effectuate the purposes of the Act (R. 23, 126-127).

We have already stated the facts with respect to the obligation to remain at work at the time and place that the refusal to work occurred and the strike technique of intermittent quickie wild cat work stoppages.

The strikers also carried on their strike in an unlawful manner, inducing or encouraging the employees of other employers to refuse, in the course of their employment, to handle messages that were or were destined to be handled by respondent (R. 453). The Board refused to permit respondent to introduce evidence that the strikers as agents of the ACA, as well as the ACA, engaged in such action in the course of the strike. Respondent also sought to show that the strikers, as agents of the ACA, were restraining and coercing the other employees of respondent in their rights guaranteed by the National Labor Relations Act in carrying out their strike. Respondent further sought to show that the strike had an unlawful purpose of requiring respondent to recognize the ACA as the exclusive collective bargaining representative of its workers at a time when it was admitted that the ACA was not the majority choice of the workers in the appropriate unit (R. 454).

Respondent was denied the opportunity to present evidence on these and other matters with respect to the issue raised by its answer that reinstatement or back pay would not effectuate the policies of the Act. The Board refused to hear any evidence on these issues (R. 23, 126-127). Instead, it arbitrarily and capriciously said that its order would effectuate the policies of the Act without any consideration of the facts surrounding this particular industry or case.

B. BASH'S STATEMENTS TO THE STRIKERS.

Leo Bash, chief operator of respondent at the time of the strike, was one of the early members of the ACA and had been one of the martyrs of that Union in the 1934 Mackay strike. Because of his active participation and leadership in that strike, he had been discriminated against by Mackay. *Mackay Radio & Telegraph Co.,* 1 N.L.R.B. 201 (1936). Finally, after long years, he was given reinstatement with back pay as a result of the Supreme Court's decision in the *Mackay* case upholding the National Labor Relations Act and the Board's right to order reinstatement with back pay. *Labor Board v. Mackay Radio Co.,* 304 U.S. 333 (1938).

Subsequently, he was employed by Globe and remained a member of the ACA during that employment and even while he was performing supervisory work, only taking his withdrawal from this union when he became Globe's chief operator (R. 355). He became very disturbed when his union, the ACA, failed to take the necessary action so that non-Communist affidavits could be filed and it could fully comply with the requirements of the amended National Labor Relations Act (R. 371). Consequently, during the period beginning at least in the summer of 1948, the IBEW and the ACA adherents among the Globe employees were at odds and were repeatedly discussing the pros and cons of the ACA and other unions (R. 141, 172-173).

He frequently accused the ACA of being Communist-dominated and accused ACA adherents, among the Globe employees, of being Communists or fellow travelers (R. 141, 194, 211, 262, 381-384). On at least one occasion, exchanges between him and an ACA member were very

heated and almost led to physical violence on the premises (R. 29-30, 141).

The ACA adherents told the Company that Bash "was a raving maniac, and that it was impossible to deal with him in a reasonable way" (R. 175, 209). They said that it was the usual thing for Bash "to be hollering at somebody" (R. 195). One of the strikers told Bash to his face, "Leo, that is the trouble with you, you are so hot headed, you do things before you think" (R. 213). The Trial Examiner found that Bash had made certain statements regarding the ACA, as it was operating at the time of the strike, and the Communists. He found, "The entire record shows Bash to be of an excitable and undiplomatic temperament" (R. 41), and that he had a "willingness to use any stigma to beat a dogma" (R. 42).

On the basis of the entire record, the Examiner found that these statements did not constitute or imply "a threat of reprisal or force or promise of benefit" (R. 42). One of the principal statements that was alleged to constitute a threat of reprisal or force or promise of benefit was made in the course of a telephone conversation that the person then being "threatened" summarized as being an apology by Bash for the action he had taken (R. 214), and one in which there was no suggestion that the striker would obtain any benefit by leaving the group of strikers and coming back to work (R. 220).

The Board reversed the finding of the Examiner (R. 82-83). In doing so, it gave no consideration to the general record and reached its conclusion solely on the basis of the citation of cases and without consideration of the evidence. Thus, the Board stated, "His admonition to get out while

the getting was good was an unequivocal warning that the employer intended to discriminate against ACA members, combined with an assurance that if Pottle left the Union, her position would be safe" (R. 82). The record, however, shows that Pottle, in no way, thought that this statement suggested that she would be secure in her job if she left the ACA (R. 220).

The Board further concluded that these statements of Bash represented the position of the company and that respondent was responsible for these statements (R. 82-83). This finding was made although the strikers had insisted that Bash should be discharged (R. 193-94) and that he was responsible for all of the trouble in the operating room (R. 147, 156), although the statements principally relied on were made in the course of Bash's attempt to justify and apologize for the action he had taken, in the course of which he said that if he had known this would result, he would never have done it, and although Bash was asked to resign and subsequently was demoted between the time of the strike and the time of the hearing (R. 215-16, 380).

Respondent asserts, *if the Board had any jurisdiction to go into any alleged unfair labor practices of the type just discussed,* that this Court must accept the finding of the Trial Examiner that these statements contained no threat of reprisal or force or promise of benefit. It further contends that the Board's contrary conclusion is not a finding of fact, is not supported by substantial evidence on the record considered as a whole and is contrary to such evidence (R. 475-76).

C. THE BOARD'S ORDER.

We have already stated the facts and findings on the basis of which respondent attacks the affirmative order of reinstatement with back pay on the ground that it is contrary to law, both substantively and procedurally.

The order provides that reinstatement with back pay should be granted if certain hypothetical occurrences should take place. On the basis of the findings and conclusions it stated that neither reinstatement nor back pay was proper on the status of the record presented. It ordered reinstatement and back pay, however, should the strikers at some time give up their strike demands and unconditionally seek reinstatement with provision for back pay for any period that might exist between such an abandonment of the strike and the first offer of reinstatement should that be subsequent to the abandonment of the strike (R. 93).

Paragraph 1(b) of the affirmative order provides an omnibus cease and desist order (R. 93-94). However, there is nothing in the charge or the complaint suggesting an allegation that respondent exhibited a general disregard for the provisions of the Act. There are no findings supporting this paragraph.

On the basis of these errors, respondent has filed its Answer praying in the alternative that the Court deny enforcement or remand the case for further evidence before the Board should the record require amplification in accordance with respondent's motion for leave to adduce additional evidence (R. 471 et seq.).

QUESTIONS PRESENTED

(1) Whether there is substantial evidence on the record considered as a whole supporting the Board's crucial finding that the strikers' jobs were not available to them between their refusals to work and their replacement.

(2) Whether the Board has any power to order reinstatement with back pay of striking employees who are told they are "discharged" or "fired" if their jobs are continuously open to them or if they have never unconditionally sought reinstatement.

(3) Whether the Board may order reinstatement with back pay of economic strikers where their strike has been neither caused nor prolonged by any unfair labor practice.

(4) Whether this Court should enforce an order of reinstatement and back pay for employees who, in going on strike at the time and place selected, violated obligations to work imposed by federal and state law and contract.

(5) Whether an affirmative order of the Board will be enforced which on its face admits the record does not show facts requiring reinstatement or back pay and they may never arise.

(6) Whether a respondent was lawfully and constitutionally denied use of discovery procedures to assist in preparation for a hearing in view of the broad discovery procedures open to the Board's general counsel and respondent's statutory right to subpenas.

(7) Whether the Board gains authority to issue an order based on charges which in fact were filed by a labor organization that has not complied with Section 9(f), (g) and (h) of the Act by making an "administrative determination" that the charges were not so filed while refusing to hear contrary evidence.

(8) Whether the Board may consider an alleged unfair labor practice as to which no charge has been filed.

(9) Whether substantial evidence in the record as a whole sustains the Board's finding, contrary to that of the Trial Examiner, that certain statements of a minor supervisory employee are admissible evidence under Section 8(c) of the Act and show a violation of Section 8(a)(1) of the Act.

(10) Whether an omnibus cease and desist order of the Board will be enforced where there are no findings as to the respondent's opposition to the purposes and policies of the Act and the Board has refused to consider evidence showing its general acceptance of the Act.

(11) Whether an affirmative order of the Board will be enforced when the Board refuses to hear evidence as to why such an order will not effectuate the policies of the Act and fails to make findings or give reasons supporting such order.

SUMMARY OF THE ARGUMENT

1. The Board has no jurisdiction in this proceeding. The charges were filed by a labor organization that had failed to comply with Section 9(f), (g) and (h) of the Act. Respondent is entitled to prove this fact despite an "administrative determination" to the contrary. In addition, no charge was filed with respect to the alleged coercive statements.

2. Respondent was denied due process of law. The Board refused to permit it any discovery procedures. This was contrary to statute. It disregards the "cherished tradition of fair play" the Constitution guarantees in these proceedings.

3. The employees who struck in protest against Jones' discharge were economic strikers. The Trial Examiner's finding that their jobs were always open to them must be accepted; the Board's contrary finding is without support in the evidence. The Board's affirmative order depends on this finding. Even if the Board's conclusion of an unfair labor practice were correct, its order is punitive. It directs reinstatement with back pay although the strike was neither caused nor prolonged by an unfair labor practice. There is no "status quo ante" to restore; the "discharge" caused no effect. Furthermore the strikers violated their obligations to remain at work at the time and place they chose to strike. An order of reinstatement or back pay is contrary to law.

4. The Board's affirmative order was issued without the necessary procedure. The Board struck defenses, refused to accept evidence and failed to make the necessary findings on issues going to the propriety of an affirmative order.

5. The statements of Bash are, by virtue of 8(c), no evidence of an unfair labor practice. They contain no promise of benefit or threat of reprisal or force. In any event, the statements were not violative of 8(a)(1). They were not threatening or coercive. They are not chargeable to respondent.

6. The omnibus cease and desist order must be denied enforcement. There is no finding of a general attitude of opposition to the Act.

7. Were the Court to conclude that the present record indicates a basis for enforcement of the Board's order, it would then be called upon to grant respondent's motion for leave to adduce additional evidence. Respondent was

denied the opportunity to present evidence going to the availability to the strikers of their jobs while they were on strike, their strike demand that a union be recognized as exclusive bargaining representative while it was not the choice of a majority of the employees, the strikers' participation in activities in violation of the Act in carrying on their strike, and their abuse of their right to engage in concerted activity. It has asked leave to submit further proof that the strikers' jobs were open to them. This evidence all goes to the question of whether an affirmative order with back pay was justified. Respondent also was prevented from showing that the charges were filed by a union not in compliance. It is entitled to prove the error of the Board's "administrative determination" that it had jurisdiction to proceed on the charges.

ARGUMENT

I

The Order Is Not Within the Jurisdiction of the Board

A. THE CHARGES WERE MADE AND FILED BY A NON-COMPLYING UNION.

Section 9(f), (g) and (h) of the Act provides that no complaint shall be issued by the Board[21] pursuant to a charge made by a labor organization unless that labor organization has (1) filed a statement containing certain detailed information concerning its officials, finances and internal organization; (2) brought such statement up-to-date annually; (3) filed affidavits that its officers are not Communists or fellow-travelers. We shall hereinafter refer to satisfaction of these requirements as "compliance."

Respondent alleged (R. 20) and sought to introduce evidence to prove (R. 123) that the charges herein had been made and filed by a labor organization that had not complied with Section 9.

Respondent asserted at the hearing, as it asserts here, that compliance was a question of fact which required inquiry and proof. The Trial Examiner ruled, "Well, if it is a matter of fact it is a matter of administrative fact * * It is all an administrative matter. That has been consistently held by the Board ever since Taft-Hartley" (R. 23-24). The Board adopted the same position—that there could be no litigation of the matter of compliance (R. 80).

The Board's position in relation to these requirements has been overruled by the Supreme Court.

The Board advanced the same contention in *Labor Board v. Highland Park Mfg. Co.,* 341 U.S. ....., 19 U.S.L. Week

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[21] An order of the Board must be based on a complaint raising the issues on which the order is based. *Consolidated Edison Co. v. Labor Board,* 305 U.S. 197 (1938).

4299 (U.S. Sup.Ct., May 14, 1951). It argued that an "administrative determination" regarding compliance was not reviewable at the instance of an employer in an unfair labor practice proceeding.

The Supreme Court held that the issue of compliance is a reviewable one. It stated:

> "* * * the congressional purpose was to 'wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government' * * *
>
> "The further contention is advanced by the Board that the administrative determination that a petitioning labor organization has complied with the Act is not subject to judicial review at the instance of an employer in an unfair labor practice proceeding. * * *
>
> "It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct. The Board is a statutory agency and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid. We think the contention is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal."

In the present case there is a factual issue; clearly, if the facts are in dispute they must be litigated before the Board so that the legal questions may be here reviewed.

True, in the *Highland Park* case the facts were admitted and the only issue was one of law. The Court said,

> "If there were dispute as to whether the C.I.O. had filed the required affidavits * * * *and the Board had resolved that* * * * a different question would be presented" (19 U.S.L. Week at 4299).

But that "different question" is not here presented. Here the Board has failed and refused to resolve the issue of fact as to compliance. Here, as in the *Highland Park* case, the issue "goes to the heart of the validity of the proceedings on which the order is based" and accordingly "it is open to the courts when they are asked to lend their enforcement powers to an administrative tribunal."

The Act denies jurisdiction to proceed on charges "made by a labor organization" not in compliance (Act, Sec. 9(f), (g) and (h)). Clearly the question as to who made the charge is a factual issue; the clear intent of Congress that Communistic unions not be permitted to use the Board's procedures is not to be subverted by an *ex parte* "administrative determination" that a charge was made by an individual if that conclusion is contrary to the fact. Respondent is entitled to its day before the Board to show that *in fact* a Communist-dominated union made the charges, and it is entitled, before this Court, to review of any questions of law involved.

The clear provision of the Act, as interpreted in the *Highland Park* case, requires denial of enforcement or, at the least, remand for determination of this basic, jurisdictional issue.

B. THE BOARD'S ORDER EXTENDS TO UNFAIR LABOR PRACTICES AS TO WHICH THERE IS NO CHARGE.

The Board's order concludes that respondent committed two distinct unfair labor practices: the first relates to cer-

tain alleged coercive statements made by a minor supervisory employee of respondent, the other relates to the strike action. In this section respondent attacks only the first portion of the order. It asserts that no charge has been filed with respect to this alleged unfair labor practice and that the Board was without power to issue the complaint or an order in the absence of a charge with respect to this unfair labor practice.

Section 10(b) of the Act provides:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *."

This language expressly fixes the limits of the Board's jurisdiction. It permits the Board to issue a complaint and an order with respect to an unfair labor practice when, but only when, a charge is filed stating the unfair labor practice, and such charge is filed and served within six months of the occurrence of that unfair labor practice.

It is clear that a discharge of a person for a specific act, not found to be activity on behalf of a named union, which occurs on a specific date, at a specific time, is a different unfair labor practice from one consisting of threats of dis-

charge or demotion as a penalty for other activity on behalf of a named union particularly where the threats occurred at different times and places from the discharge. The principle that different facts are different unfair labor practices and also the necessity that the complaint state the alleged unfair labor practice referred to in the order, were established by the Supreme Court in *Labor Board v. Sands Mfg. Co.*, 306 U.S. 332 (1939). The Court there stated, at pages 345-46:

> "The Board found as a fact that in offering reemployment to two of its old men the respondent stipulated as a condition that they join the International Union. The finding is sharply challenged but, as there is evidence in support of it, we accept it. Based upon this finding the Board contends this stipulation in connection with the offer to hire the men was a violation of Section 8(3) of the Act independent of any of the violations flowing out of the discharge and refusal to reemploy the men as a body. The contention is irrelevant to any issue in the cause. The complaint alleged that the discharge of the men constituted an unfair labor practice in violation of Section 8(1) and (3) and that the execution of the agreement with the international association constituted an unfair labor practice under Section 8(5). It nowhere refers to any discrimination in hiring any man or charges any violation in connection therewith."

Applying this principle to the present situation it is clear that the order refers to two unfair labor practices and that only one of these is covered by the charge.

The cases cited by petitioner (O.B. 27-28) for the proposition that the complaint may "enlarge" upon the charge are quite beside the point. In the first place, this is not a case

of a complaint enlarging upon a charge—it is a case where the complaint alleges an unfair labor practice which was never made the subject of any charge. It was not referred to even indirectly in any charge, and it relates to matters entirely different from anything alleged in any charge.

The case cited by petitioner that is closest to the point is *Kansas Milling Co. v. Labor Board,* 185 F.2d 413 (10 Cir. 1950). In this case the Court of Appeals held that an *amended charge* may be filed later than the six months limitation period established by Section 10(b), if the amendments relate to the *same* unfair labor practices that were alleged in the original charge. Here in contrast, the Board has permitted litigation of an alleged unfair labor practice that is entirely different in every way from those alleged in the charge.

The *National Licorice* case, 309 U.S. 350 (1940) arose under the Act prior to the time the language we rely upon was added to the Act. Furthermore, the Supreme Court expressly refused to consider whether a new and different unfair practice could be alleged in the complaint under the old Act; it held only that where practices alleged in the charge were continued pending the hearing before the Board, the Board could consider them, even though, of course, it would be impossible for any charge to be filed in that proceeding concerning them. The *Consumers Power,*[22] *American Creosoting*[23] and *Fort Wayne Corrugated Paper*[24]

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[22] *Consumers Power Co. v. Labor Board,* 113 F.2d 38 (6th Cir. 1940).

[23] *Labor Board v. American Creosoting Co.,* 139 F.2d 193 (6th Cir. 1943).

[24] *Fort Wayne Corrugated Paper Co. v. Labor Board,* 111 F.2d 869 (7th Cir. 1940).

cases likewise all arose under the law prior to the amendment to Section 10(b). Furthermore, they involve only the constitutional sufficiency of the complaint to give notice to the employer where the charge supports the complaint. They do not involve the requirement in Sec. 10(b) that a charge be filed stating the unfair labor practice involved. The *Fulton Bag*[25] and *Indiana & Michigan*[26] cases are absolutely beside the point, except that the *Indiana & Michigan* case emphasizes that the charge is jurisdictional. In the *Cathey Lumber* case,[27] which was enforced without opinion,[28] the Board held (1) the additional unfair labor practices alleged in the complaint were of the same nature as those alleged in the charge; (2) the employer had waived the six months requirement when it failed to raise this point in its answer. That case merely sustained the Board's conclusion that the issue was waived.

In the instant case, the charges referred only to specific discharges on or about January 22, 1949. We make no point of the language used or the artistic or inartistic way in which the charges were drawn; we are concerned with their substance. They stated that on such a day respondent discharged the charging employee for concerted activity in protesting the discharge of Jones (R. 6, 7-8). Nowhere is there mention of threats of discharge or demotion as a penalty for activity on behalf of the ACA. In fact, the ACA is not mentioned. Yet the complaint alleges (R. 10-12) and the Board's order finds (R. 81, 83, 88-89) other un-

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[25]*Labor Board v. Fulton Bag & Cotton Mills*, 180 F.2d 68 (10th Cir. 1950).

[26]*Labor Board v. I. & M. Electric Co.*, 318 U.S. 9 (1943).

[27]*Cathey Lumber Co.*, 86 N.L.R.B. 157 (1949).

[28]*Cathey v. Labor Board*, 185 F.2d 1021 (5th Cir. 1951) (Mem.).

related violations; and the Board grants relief based upon such unrelated allegations (R. 91-94). This the Board is without power to do.

Closely in point is *Joanna Cotton Mills Co. v. Labor Board,* 176 F.2d 749 (4 Cir. 1949). There a charge alleged the discharge of a man on account of union activities and membership. More than six months after the effective date of the 1947 amendments (which inserted the provisions of Sec. 10(b) quoted above) an amended charge was filed which referred to the same discharge but alleged it was for engaging in concerted activities having no relation to union activities. The Court set aside the order of the Board relating to the unfair labor practice stated in the amended charge:

> "Section 10(b) of the Labor Management Relations Act, 29 U.S.C.A. § 160(b), specifically provides that 'no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.' * * * No charge relating to discharge for engaging in concerted activities, as distinguished from union activities, was served upon the company until more than six months had elapsed after the act had become effective.
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> * * * * * * *
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> "The case seems clearly one for the application of the rule recently announced by the Supreme Court that 'a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to

the first claim.' *United States v. Andrews,* 302 U.S. 517, 524; *United States v. Garbutt Oil Co.,* 302 U.S. 528. * * *

"For the reasons stated, the order of the Board will be set aside."

The Court of Appeals for the 7th Circuit has recently denied the position here taken by the Board that the filing of a charge permits it to go into any unfair labor practice that occurred within six months of filing.[29] In *Superior Engraving Company v. Labor Board,* 183 F.2d 783 (7th Cir. 1950), cert. denied 340 U.S. 930 (1951), the Court refused to give consideration to unfair labor practices that were not alleged in a charge, even though referred to in the complaint, on the ground that Section 10(b) requires filing and service of a charge with respect to a specific unfair labor practice before the Board has jurisdiction to proceed with respect to it.

Accordingly, the provisions of the Board's decision and order relating to alleged threats and coercive statements concerning the ACA are void for the reason that no charge was filed and the Board was without jurisdiction to consider them.

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[29]The Board goes so far as to argue (O.B. 28) that service of the complaint was a sufficient compliance with the Act, although the Act explicitly requires service of the *charge,* Sec. 10(b), in such manner as to make the requirement jurisdictional.

II.

The Board's Procedure Denied Due Process of Law

A. THE BOARD'S PROCEDURE DENIED RESPONDENT THE FAIR HEARING REQUIRED BY STATUTE AND THE CONSTITUTION.

Respondent sought to utilize discovery procedures so as to place it in a comparable position to that of the general counsel of the Labor Board in presenting the evidence at the hearing and building the record considered by the Trial Examiner, the Board and this Court.

The general counsel of the Board has a right by statute to carry on an intensive pretrial investigation of the issues. This includes the investigatory powers of access to the premises of respondent with the right to copy any evidence there found (Act, Sec. 11(1)); in addition, the Board's investigators take statements from all parties and those having knowledge as to the charges, including respondent's supervisory staff.[30]

Respondent, however, cannot unilaterally take statements from any of the persons on strike, for such action would in itself be an unfair labor practice under Section 8(a)(1). *Labor Board v. Botany Worsted Mills,* 106 F.2d 263 (3 Cir.

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[30]Sec. 101.4 of the Board's Statements of Procedure provides:

"Investigation of charges.—When the charge is received in the regional office it is filed, docketed, and assigned a case number. The regional director will, on request of the charging party, and may in any case cause a copy of the charge to be served upon the person against whom the charge is made, but timely service of a copy of the charge within the meaning of the proviso to section 10(b) of the act is the exclusive responsibility of the charging party and not of the general counsel or his agents. The regional director requests the person filing the charge to submit evidence in its support. The person against whom the charge is filed, hereinafter called the respondent, is asked to submit a written statement of his position in respect to the allegations. The case is then assigned to a member of the field staff for investigation, who interviews representatives of all parties and those persons who have knowledge as to the charges."

1939); *Labor Board v. Stone,* 125 F.2d 752 (7 Cir. 1942); *Interstate Folding Box Co.,* 47 NLRB 1192 (1943). The rules of the Board, however, make provision for the taking of depositions (NLRB Rules and Regulations, Sec. 102.30) and the Act places a mandatory duty upon the Board to issue subpoenas requiring the attendance and testimony of witnesses and production of any evidence upon application of any party to a proceeding before the Board (Sec. 11(1)). Accordingly respondent prepared applications for subpoenas for the taking of depositions before trial, in accordance with the usual and standard procedure under the Federal Rules of Civil Procedure for the United States District Courts (R. 103-119).

The Board denied respondent any opportunity to use the discovery process, by order prior to hearing (R. 120-23) by order of the Trial Examiner (R. 99-102) and by final order of the Board (R. 80).

The denial of the subpoenas was a violation of both the Act and Section 6(c) of the Administrative Procedure Act. It furthermore was a denial of due process of law in violation of the Fifth Amendment. It is well established that this amendment guarantees a fair and equitable procedure in the course of administrative adjudication. While the requirements of due process of law are neither rigid nor technical, there is a positive obligation upon the administrative tribunal to act "in accordance with the cherished judicial tradition embodying the basic concepts of fair play." *Morgan v. United States,* 304 U.S. 1, 22. The courts have recognized that adjudication should not be a contest of wits between attorneys in which both sides are free to conceal and withhold the evidence they have so as to take full ad-

vantage of any opportunity to surprise and disconcert opposing counsel. Accordingly, the Federal Rules of Civil Procedure provide a full and exhaustive discovery method so that all parties are fully acquainted with all of the evidence before the case comes to trial. Fed. R. Civ. Proc., 26-37. On the basis of a realization that there can be fair and sound adjudication only if every one is aware of the evidence so that the actual facts will determine a decision, the discovery procedure has been generally adopted in the state, as well as in the federal, courts.

The broad scope of the discovery procedures given general counsel for the Board is in sharp contrast with the limited rights of the respondent and an employer's obligation under the Act to refrain from any inquiry of employees, strikers or former employees with respect to a matter that may be in litigation. Here respondent carefully sought to obtain a fair and equal position to that of the general counsel and utilized the provisions of the regulations and law that would assist such action. It was denied equivalent treatment, even such as was required by statute. As a result, respondent's counsel came into the trial with no knowledge as to what evidence was available to the general counsel for the Board, but the Board's general counsel had complete information as to every item of evidence available to respondent's counsel. We respectfully submit that such inequitable treatment does not accord "with the cherished judicial traditions embodying the basic concept of fair play" and the order must, therefore, be denied enforcement.

III

The Board's Affirmative Order of Reinstatement with Back Pay Is Contrary to Law

A. THE ORDER DEPENDS ON A FINDING THAT IS WITHOUT SUPPORT IN THE EVIDENCE.

The crucial finding of fact, on which the Board's conclusion that reinstatement with back pay was required because of a violation of 8(a)(1) and 8(a)(3) by "discharge" of the strikers, is contrary to the fact and is without substantial evidence to support it on the record considered as a whole.

The Board and the Trial Examiner reached directly contradictory conclusions as to reinstatement and back pay for the strikers. The difference in these conclusions turns on the finding of the Trial Examiner that any or all of the strikers could have had their jobs back at any time before they were filled by new employees (R. 39). The Board stated a contrary finding. It "found" that the strikers could *not* have had their jobs back between the time they went on strike and the time their jobs were filled by new employees (R. 85n) and therefore that their subsequent replacement while on strike would not have the usual consequences of replacement of economic strikers.[31]

The Board concluded that respondent had taken the position that it would not return the strikers to work even if the strikers gave up their demand for the reemployment of Jones. There is no quarrel in the Board's decision, or in the brief supporting it, with the proposition of the Trial Examiner that reinstatement or back pay could not be ordered

[31]The Board and the Examiner agreed that the strike was an economic one and that respondent would normally be free to replace the strikers while they continued on strike (R. 84).

if the jobs of the strikers were available to them during the period of their strike, up to the time they were replaced by new permanent employees.

The Board's finding that the jobs were not open to the strikers must be rejected by this Court.

From the record as a whole it appears that there was no real dispute during the course of the hearing with respect to the availability of the strikers' jobs if they would give up their demands for the reemployment of Jones. The record shows that it was the position of the General Counsel that the discharge of Jones was an unfair labor practice and that the strikers were secure in their refusal to return to work until Jones was reemployed, because the strike was an unfair labor practice strike rather than an economic one. *At no time was there any suggestion that respondent was denying reemployment to the strikers if they would give up their demand for the reemployment of Jones.*

Nevertheless, there is clear evidence in the record that respondent was ready, during the strike, to return the strikers to work if they would give up their demand for the reemployment of Jones. This was the reason why the Trial Examiner found, with respect to all of the strikers, "It is clear that any or all of them could have had their jobs back at any time before they were filled by new employees. It is not in dispute that the strike is still in effect, that there has been no request for reinstatement following the strike, and that respondent has filled the strikers' jobs with other and permanent employees" (R. 39). This finding by the Trial Examiner, who conducted the hearing, heard the testimony and observed the witnesses, is a persuasive fact to be considered by this Court in judging whether there is

substantial evidence in the record considered as a whole to support the contrary finding of the Board. *Universal Camera Corp. v. Labor Board,* 340 U.S. 474 (1951).[32]

There is convincing evidence in the record to support the Examiner's finding. Thus the record shows that there were repeated attempts by supervisory employees of respondent to get the strikers as a group to give up their demand for the reinstatement of Jones and return to their jobs. Bash and McPherson both made it clear to the employees that their jobs were available to them and the afternoon meeting at which this was discussed was terminated only when the strikers asked for their paychecks (R. 210). Two of the strikers received individual telegrams, because of the uniqueness of their situations, asking them to meet with the District Manager of respondent with the indication that they could be returned to work (R. 320-22; 349-50). The record further shows that respondent met with collective bargaining representatives of the strikers a few days after the strike began, at which time their discussion went so far as to go into the possibility of recognizing the ACA as representative of all of the employees including the strikers (R. 464). Respondent has further asked leave to adduce evidence on this point and has offered to prove that at this time it and the ACA-C.I.O. Committee explored in detail the matter of return to work of the strikers and that the demands of the strikers on their return to work were considered (R. 461-465; 481-483). In short, this indicates

[32]Wherein the Supreme Court said, "* * * evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." 340 U.S. at 496.

that respondent was treating the strikers as strikers and was negotiating with their representatives regarding the terms and conditions under which they would return to work.

What, if any, evidence is relied upon by the Board in support of its contrary finding is not clear. None is referred to by it (R. 85). However, it appears from the Board's brief (O. B. 7-8; 19) that it goes so far as to argue that Lillie Friend was discharged and was denied any chance to return to work if she would give up her demand for the reemployment of Jones, when she was told that her job was waiting for her, that she should go to work, and, when she failed to do so, "Well, trot along then."[33]

The Board argues that the mere statement to employees that they were "discharged" or "fired" or even "well, trot along then" constitutes heresy and unfair labor practice justifying an order of reinstatement with back pay.

On this point the Board places heavy reliance upon *Labor Board v. Remington Rand, Inc.,* 130 F.2d 919 (2 Cir.). That case, however, is without significance unless the Board's finding overruling the Trial Examiner's finding that the strikers' jobs were at all times open to them is not accepted by the Court. In the case relied upon by the Board, the employer sought to deny any right of reinstatement to strikers on the ground that they had been discharged prior to the time that they had been replaced by others. It sought to justify "its immediate discharge of the strikers and attempted abnegation of the employment rela-

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[33]It is significant that respondent's offer of proof in connection with its motion for leave to adduce additional evidence states that Lillie Friend has been reemployed and presently is an employee of respondent (R. 463).

tionship" on the ground of non-discrimination. The Court concluded, however, that the employer's action was discriminatory because it was contrary to the employer's practice with respect to non-union employees engaging in similar work stoppages and was accomplished by an attempt to "sever the employment relationship" by immediate action giving no "locus penitentiae." Relying on these facts, the court concluded that a discriminatory refusal to permit strikers to return to work before their jobs were filled and after they had sought reinstatement was an unfair labor practice. These facts are a far cry, it is patent, from those found by the Trial Examiner, for here the strikers' jobs were open to them and respondent gave the strikers repeated opportunities and invitations to return to work.

On consideration of the record as a whole, there is not substantial evidence to support the Board's "finding" that is the keystone to its order of reinforcement and back pay. Enforcement should therefore be denied.

B. THE ORDER OF REINSTATEMENT WITH BACK PAY IS PUNITIVE, NOT REMEDIAL.

Even were we to accept the Board's findings and conclusion that the strikers were told they were "discharged" or "fired" in violation of the Act, reinstatement with back pay would be contrary to law. It is admitted in the Board's decision and order that these alleged unfair labor practices did not cause a strike and did not prolong a strike. No one of the strikers was in any way hurt or injured by such alleged unfair labor practices. They went on strike independent of these, they stayed on strike independent of these, and they remained on strike, independent of these. They

continued their refusal to return to work unless respondent acquiesced in their demands, insofar as the record shows, right up to this moment. The only exceptions relate to those strikers who have returned to work.

It was clearly established in one of the earliest cases involving the Act that the Board's power to order reinstatement with or without back pay is a purely remedial power. *Consolidated Edison Co. v. Labor Board,* 305 U.S. 197, 235-36 (1938):

> "This authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.
>
> "The power to command affirmative action is remedial not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purpose of the Act."

Where the employer's unfair labor practice has not deprived any employee of work and there are no facts showing that he has suffered any loss of pay, an order of reinstatement with or without back pay is punitive, not remedial. The use of the word "discharged" or "fired" deprived no one of work or of pay.

The Board has previously concurred in this position and has agreed that reinstatement with back pay is not required with respect to economic strikes except only where the economic strike has been turned into an unfair labor

practice strike and it has been prolonged because of the unfair labor practice. *Wilson & Co. v. Labor Board,* 120 F.2d 913 (7th Cir. 1941). Its deviation from its usual rule is contrary to law and enforcement of the resulting order should be denied.

C. THE ORDER OF REINSTATEMENT AND BACK PAY IS IN VIOLATION OF LAW.

The power to order reinstatement with back pay, *even of unfair labor practice strikers,* "is not unlimited." *Labor Board v. Fansteel Metallurgical Corp.,* 306 U.S. 240 (1939). Such an order is unlawful where it disregards the entire structure of law. As the Supreme Court stated in *Southern S.S. Co. v. Labor Board,* 316 U.S. 31, 47 (1942):

> "* * * the board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.
>
> "This was the kind of consideration for which the present case called."

In that case the Court concluded that the reinstatement ordered by the Board "exceed[ed] the Board's authority to make such requirements 'as will effectuate the policies of the Act' ". The Court continued by stating:

> "Nothing that we have said would prevent the union from striking, picketing or resorting to any other means of self help, so long as the time and place it

chooses does not come within the express prohibition of Congress." 316 U.S. at 49.

Initially, we wish to point out that respondent does not suggest that its employees do not have the right to strike. To the contrary, it concedes this right. It recognizes its employees may strike or take other concerted action as they choose so long as their choice of time, place, technique and goals does not result in violation of other provisions of law. Respondent urges, in this section, that the law imposes certain obligations upon its employees upon their voluntary taking over a watch. The public interest requires that these employees stand the watch and transmit messages so that, absent notice to the contrary, the public will get the service upon which it relies.

The facts show that the strikers violated their obligations under the law when they went on strike. Thus the workers who were due to man the afternoon and midnight watches on January 21 reported to work as usual at the regular time. Then they relieved the workers who had been manning the previous watch. They assumed their duties and started to perform them for some time. Subsequently and according to prearranged plan and with the intention of preventing the continuance of operations, they deserted their watch and refused to provide the public utility service that the public was entitled to have. In fact several of the strikers on the midnight watch took such action after specifically advising respondent that they would come to work as usual.

The Federal Communications Act imposes an obligation upon respondent's employees to accept and send messages during a watch that they assume. When such an employee

comes on the job and takes over a watch and relieves another worker, the statute places him under a duty to serve the public.

The Board admits that Section 201 imposes a duty on respondent to furnish service to the public upon reasonable request. (R. 86) Failure to provide such service is a violation of its basic duty as a common carrier of interstate and foreign communications by radio. This statute further provides, in Section 217 (quoted at p. 16 above), that any act, omission or failure of an employee of respondent is deemed to be the act, omission or failure of respondent. Here the workers took over their circuits and entered into the scope of their employment; thereafter they failed and omitted to handle messages. Respondent thereby failed and omitted to furnish service as required. Respondent thereby unlawfully breached its duty as a public utility.

Section 501 of this statute (quoted at p. 16 above) further provides that respondent's employees, including the strikers, are guilty of a felony if they willfully and knowingly cause or suffer something to be done that is prohibited or declared to be unlawful by the statute. The acts of the strikers caused an unlawful failure to provide service for which respondent was liable. The acts were willful. Hence, their desertion of their circuits while on watch and their refusal to man the circuits during the period of their watch constituted a violation of the Federal Communications Act.

True, respondent need provide service only on "reasonable request." However, if there is no notice of a strike, a request in the usual manner is "reasonable" and it is to be satisfied. If the strikers had given reasonable notice to the public or had failed to assume their duties as employees at

the begining of a watch, there may well have been no violation of law by them. But to have refused to work without notice, at the time and place selected, renders their acts unlawful.

Section 638, California Penal Code (quoted at p. 16 above), likewise imposed an obligation. This section makes employees of respondent guilty of a misdemeanor if they refuse to send messages received at the office for transmission. It required each striker to have performed his work during the watch he assumed. He was under a duty to send any message received. The New York Court of Appeals has recently dealt with a similar situation under a provision of the New York Statutes in language identical to Sec. 638. Employees of Western Union were discharged for refusing to handle certain messages while they were on duty on the ground that the messages were strike-bound. The court held that the New York statute and also the Federal Communications Act required the company and the employees to send these messages so long as they chose to occupy positions in the company's office rather than leaving their positions and going on strike. This case enforces the obligation upon those who are at work to send messages while they are on watch. It upholds the right of an employer to discharge those who refuse to send messages during the course of a watch they have assumed. *Western Union Tel. Co. v. American Communications Association,* 299 N.Y. 177, 86 N.E.2d 162 (1949).

There is a further obligation to keep the circuits operating throughout the watch by virtue of contract. The old agreement had a specific no-strike clause incorporated in it. Respondent had offered work to the employees in ac-

cordance with the terms of that agreement and the employees had accepted this offer when they continued to work in response to this offer. Furthermore, there had been a similar precipitous work stoppage by these workers some months before. When this was discussed between the ACA representatives and the company, while the status of the ACA was in doubt, it was agreed that the workers were obliged to keep the circuits operating while they were on watch. This obligation was further clarified by a posted company rule indicating that a refusal to perform work was a ground for discharge. These provisions of the employees' old written contract, their oral contract of employment, and the rules of the employer serve to buttress and clarify the clear obligation imposed by law: telegraph employees while on duty are required to continue work during their watch and furnish service as called upon by the public.

This duty was breached when the strikers engaged in their unannounced wildcat "strike."

An order of reinstatement with back pay under such circumstances, we submit, is a single-minded consideration of the Act that wholly ignores other and equally important provisions of law. It disclaims "careful accommodation of one statutory scheme to another." In a wide variety of instances, similar to the situation here presented, the courts have held reinstatement with back pay to be contrary to law.

An order of reinstatement with back pay was denied enforcement in *Labor Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240. There strikers had engaged in a sit-down strike and others had aided or abetted those engaged in

the sit-down. The Court refused to enforce an order of reinstatement, stating the Act "did not automatically provide reinstatement" and continuing, "The affirmative action that is authorized is * * * not to license [strikers] to commit tortious acts or to protect them from appropriate consequences of unlawful conduct." To a similar effect is *Labor Board v. Sands Mfg. Co.,* 306 U.S. 332. There, an employer rightfully understood his employees were "irrevocably committed not to work in accordance with their contract" and replaced them. The Court stated that the Act permits "an effective discharge for repudiation by the employee of his agreement." See also *Labor Board v. Draper Corp.,* 145 F.2d 199 (4th Cir. 1944). Where an employee goes on strike in violation of an obligation to work arising out of custom and practice, an order of his reinstatement is contrary to law. *Albrecht v. Labor Board,* 181 F.2d 652 (7th Cir. 1950). Where a seaman goes on strike at a time and place the law requires him to continue work, an order of reinstatement is in excess of the Board's authority. *Southern S.S. Co. v. Labor Board,* 316 U.S. 31.

The Courts have found that there are even more stringent limitations upon the Board's authority to order reinstatement with or without back pay. *Labor Board v. Montgomery Ward & Co.,* 157 F.2d 486 (8th Cir. 1946), involved a group of employees who remained on their employer's premises without quitting their employment, but who refused to perform certain of their duties in accordance with reasonable orders of their employer. Their concerted refusal was on the ground that the work involved was strike-bound. They were discharged, and the Board ordered their

reinstatement. The Court of Appeals denied enforcement, stating:

> "There being an implied obligation on the part of the employees to obey the reasonable instructions of the employer while the employment continued, their refusal to do so was proper ground for their discharge, and having been properly discharged there was no duty on the part of respondent to reinstate them." 157 F.2d at 497.

Similarly, where employees are offered a day's work, including straight time and overtime, and they go to work but leave without completing the shift offered, there is no right in the Board to order reinstatement to employees whom the employer refuses to permit to come to work until they were ready to accept the employers' requirement that they work the full shift. *Labor Board v. Mt. Clemens Pottery Co.*, 147 F.2d 262, 267 (6th Cir. 1945).

While the Board may not have acquiesced in the courts' decisions in the two cases last referred to, the other cases preclude enforcement of the Board's affirmative order of reinstatement with back pay, for these strikers' refusal to work was in violation of law and the Board's order of reinstatement may not be used to protect strikers from appropriate consequences of their unlawful conduct.

D. THE ORDER OF REINSTATEMENT AND BACK PAY SHOULD NOT BE ENFORCED, FOR IT IS INTERLOCUTORY AND HYPOTHETICAL.

The Board's order provides that, *if* facts develop in *one* of the possible ways they might, respondent should reinstate strikers with back pay. The Board concluded that reinstatement with back pay was appropriate only if the strikers should abandon their strike and then only if such

abandonment should occur prior to offers of reinstatement. The Board admits in its brief (O.B. 37) "If the strike has not yet been abandoned, then respondent's liability for back pay has not yet accrued." The order itself makes it clear that if the strike has not yet been abandoned, the obligation to reinstate has not yet arisen.

In short, the Board admits that the record it has filed with this Court does not provide the basis for an unconditional order of reinstatement or back pay and that there may never be a basis for one.

The courts have repeatedly denied enforcement of such orders. We submit it is hornbook law that the record filed in the Court of Appeals must include findings, with the necessary support in the evidence, to justify reinstatement with back pay before any such order may be enforced. The Board has no power to issue hypothetical orders that have meaning only IF certain facts should arise. The Board's orders must be clear and specific, final and definite. Since "violation of the order brings the swift retribution of contempt, without the normal safeguards of a full dress proceeding . . . we must require explicit language." *Labor Board v. Stowe Spinning Co.,* 336 U.S. 226, 233 (1949). As has recently been said with respect to the Railway Labor Act, a provision for orders of the type here involved "contemplates not merely general conclusions, but precise and definite findings of fact and final and definite awards, capable of enforcement, not vague general outlines which must be filled in by the courts." *Railroad Yardmasters v. Indiana Harbor Belt R. Co.,* 166 F.2d 326, 330 (7th Cir. 1948). This principle is repeatedly applied with respect to the Labor Board's orders, requiring that they be final and

definite, not interlocutory and at large. *May Department Stores v. Labor Board,* 326 U.S. 376, 392 (1945); *Labor Board v. Reynolds Corp.,* 168 F.2d 877 (5th Cir. 1948); *Labor Board v. National Biscuit Co.,* 185 F.2d 123 (3rd Cir. 1950). Thus: "The court will be acting well within the limits of its judicial discretion in withholding the use of its injunctive powers until the Board's order has been put in final form." *Labor Board v. Kelco Corp.* 178 F.2d 578 (4th Cir. 1949); see also *Labor Board v. Express Publishing Co.,* 312 U.S. 426, 435 (1941).

The application of these principles to situations like that here presented is clear. The record must include affirmative findings that strikers, even unfair labor practice strikers, have made an unconditional offer to return to work before a court will enforce an order of reinstatement with back pay. Thus, a conditional offer to return to work, even where an economic strike had been converted into an unfair labor practice strike, is an insufficient basis for such an order. *Labor Board v. Crosby Chemical Co.,* 188 F.2d 91 (5th Cir. 1951); cf. *Pacific Gamble Robinson Co. v. Labor Board,* 186 F.2d 106, 110-111 (6th Cir. 1950). Furthermore, reinstatement will not be enforced, even where economic strikers have unconditionally offered to return to work, unless there be findings as to the number of positions open. *Labor Board v. Shenandoah-Dives Mining Co.,* 145 F.2d 542 (10th Cir. 1944); *Kansas Milling Co. v. Labor Board* 185 F.2d 413 (10th Cir. 1950). In fact, orders have been remanded to the Board where its only error was in using the wrong date in figuring back pay. *Home Beneficial Insurance Co. v. Labor Board,* 159 F.2d 280 (4th Cir. 1947).

The Board nevertheless asks for enforcement of its present order, contending that respondent raises questions only

as to compliance with it (O.B. 37-38). In each of the cases relied upon by the Board, the respondent there admitted that the Board had established the necessary basis for an order, but contended that it had satisfied the order. None of these cases presented a situation, like that in this case, where the necessary findings for an order of reinstatement with back pay had not been made. Here the Board's order, itself, states there can be no obligation to reinstate with back pay until these strikers abandon their strike. And it states that no finding of abandonment can be made on the record. Hence, the Board has not only failed to make the finding necessary to support an order of reinstatement with back pay, but it has made contrary findings demonstrating that such an order is without support. The Board admits its order would be lawful only IF something happens in the future. We therefore respectfully submit that the Court should deny enforcement of the affirmative order.

E. THE BOARD'S AFFIRMATIVE ORDER WAS ISSUED WITHOUT THE REQUIRED TAKING OF EVIDENCE, FINDING OF FACTS AND STATING OF REASONS.

In A through D above we have shown that the affirmative order should be denied enforcement and set aside because contrary to law. As an alternative and further defense to the order, we urge that even if these errors did not exist the affirmative order should not be enforced because of procedural errors. Respondent's pleading raised defenses that an affirmative order would not effectuate the policies of the Act (R. 23). These defenses were stricken (R. 126-127). The Board refused to admit evidence relating to these defenses as well as establishing a general proposition that evidence going to them would not be admitted

(R. 184-186, 200, 204, 240-241, 277-278, 341, 400, 402, 425-427).

The Board issued an affirmative order of reinstatement with back pay (R. 94), as if such an order were automatically justified wherever the Board concludes that a "discharge" constitutes an unfair labor practice. There are no supporting findings showing a situation requiring an affirmative order to restore a status quo (R. 91-92). In short, the Board's order assumes that it has power to order this affirmative action, *and that it will do so as a matter of course.*

While it is established as a "dry legal question" that the Board has power to order affirmative relief in many situations, the Board must exercise its discretion, even where the law does not preclude such affirmative relief. *Phelps Dodge Corp. v. Labor Board,* 313 U.S. 177, 196-197 (1941). The purpose of an order of reinstatement and back pay, where discrimination is found, is (ibid.): "A restoration of the situation as nearly as possible to that which would have obtained but for the illegal discrimination." Such an order is not to be issued by the Board merely as a matter of administrative rote. Consideration of the background and the individual situation is required; and a bare conclusion that reinstatement with back pay will effectuate the policies of the Act may not be enforced. There must be findings of fact and appropriate reasons. *Labor Board v. Don Juan, Inc.,* 178 F.2d 625 (2d Cir. 1949). The Board is not at liberty to draw upon its presumed *expertise* and make conclusions therefrom, cf. *Republic Aviation Corp. v. Labor Board,* 324 U.S. 793 (1944), but it must hear evidence offered by a party before it with respect to appropri-

ateness of the proposed relief. An order issued without consideration of such evidence will not be enforced. *Labor Board v. I. & M. Electric Co.,* 318 U.S. 9 (1943); *Labor Board v. Kelco Corp.,* 178 F.2d 578 (4th Cir. 1949).

In the present case reinstatement was ordered merely because the employees were told they had been fired (R. 91), although there is no evidence that any unfair labor practice caused or prolonged the strike, that any of the strikers sought reinstatement (except on condition that respondent reemploy Jones, recognize the ACA and agree to other economic demands), or that the economic strike has ended (R. 92-93). In such circumstances, the Board has repeatedly held that reinstatement or back pay is not called for, and has so admitted in the courts. See *Wilson & Co. v. Labor Board,* 120 F.2d 913 (7th Cir. 1941). In that case, strikers were denied reinstatement by the petitioner therein on the ground that while on strike they had been replaced by new employees. The Board conceded in its brief: "This petitioner had, of course, the right to do until July 3, since theretofore the strike had neither been caused nor prolonged by its unfair labor practices." (Quoted at 120 F.2d 922).

Yet in the present order, as in the *Phelps Dodge* and *Don Juan* cases, supra, the Board gives neither findings nor reasons for its order, even though the strike here was neither caused nor prolonged by an unfair labor practice. Nevertheless, the Board's order includes merely a stereotyped statement, a bare legal conclusion without any facts or any consideration thereof to support it.

The Board's procedure was unlawful in other respects: an affirmative order was issued after refusing to consider

issues which must be weighed in exercising its discretion to order affirmative relief.[34]

The Board must consider the purposes of the strike. Affirmative relief is to be denied where the strikers seek to compel an employer to grant a wage increase without authorization by the War Labor Board. *Labor Board v. Indiana Desk Co.,* 149 F.2d 987 (7th Cir. 1945). The Board itself has refused reinstatement where the purpose of the strikers was to force an employer to violate the War Labor Disputes Act, *American News Company,* 55 NLRB 1302, or to recognize one union while the employer was under a legal duty to bargain with another. *Thompson Products, Inc.,* 72 NLRB 886. Here, the strikers sought to compel respondent to recognize the ACA although the strikers admitted it was not the choice of the majority of the employees in the bargaining unit.

The Board is required to consider the strike technique used and to deny reinstatement where strikers have used unduly unfair strike tactics. *Labor Board v. Montgomery Ward & Co.,* 157 F.2d 486 (8th Cir. 1946); cf. *Auto Workers v. Wisconsin Board,* 336 U.S. 245 (1949). The Board must

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[34]Respondent offered to prove, if the taking of additional evidence is necessary: "(1) The strikers demanded, as a condition to their returning to work, that Respondent recognize the ACA as exclusive representative for bargaining purposes of all of its employees in an appropriate unit although they then admitted that the ACA was not the choice of the majority of the employees in such unit; (2) The strikers engaged in unlawful activities during the strike by participating in, and making their own, acts in violation of Section 8(b) of the National Labor Relations Act and by violating other statutory law. (3) The activity of the strikers was not protected concerted activity because they had entered into an agreement with Respondent not to engage in such action and they did thereafter plan and carry out a quickie strike in violation of this commitment" (R. 482-483).

also weigh the individual actions of the strikers whose reinstatement it considers. Those who have engaged in a sit-down strike or assisted in it cannot be reinstated. *Labor Board v. Fansteel Corp.*, 306 U.S. 240 (1939). It must deny reinstatement to those who engaged in terrorism, *Labor Board v. Standard Lime & Stone Co.*, 97 F.2d 531 (4th Cir. 1938); violence and unlawful conduct, *Wilson & Co. v. Labor Board*, 120 F.2d 913 (7th Cir. 1941); dynamiting, *Labor Board v. I. & M. Electric Co.*, 318 U.S. 9 (1943); shooting, *Labor Board v. Ohio Calcium Co.*, 133 F.2d 721 (6th Cir. 1943); and distribution of defamatory literature. *Labor Board v. Maryland Drydock Co.*, 183 F.2d 538 (4th Cir. 1950). The Board refused to consider evidence of the strike tactics and unlawful activities of the strikers and to weigh these facts in considering whether affirmative relief should be ordered.

Even if the Board's order were not clearly contrary to law for the reasons stated in other sections, the defects in the Board's procedure would require this Court to refuse to enforce the Board's order on the record here presented.

IV

The Alleged Threatening and Coercive Statements

A. THE CIRCUMSTANCES SURROUNDING THE STATEMENTS.

The Trial Examiner found that certain statements had been made by Bash (R. 40-42) and that his statements involved no threat of reprisal or force or promise of benefit (R. 42). The Board reversed these findings and found the statements to have such effect (R. 83). It thereupon gave consideration to these statements, in disregard of § 8(c) as evidence of an unfair labor practice. On this "evidence" it found that respondent had violated § 8(a)(1).

We submit that the findings of the Trial Examiner accord with the fact and that the Board's contrary findings are without substantial evidence to support them on the record considered as a whole. In fact, the Board's decision and order shows upon its face that the Board did not even purport to issue findings in this in this respect, but instead stated conclusions with respect to the statements, as if the words were unfair labor practices *per se*. Thus the Board based its conclusions with respect to these statements upon references to other cases involving different situations and not upon the facts and background present in this case (R. 82-83).

Undoubtedly the Trial Examiner gave great weight to the general background of Bash's statements and the consideration to these statements received in the hands of the ACA contingent among respondent's employees. There is a great body of evidence supporting the Examiner's conclusion that there was no promise of benefit, or threat of force or reprisal. Thus, members of the ACA contingent threatened to hit Bash if he made any further comments regarding their communist or fellow traveler status.[35] Thus it is clear that little, if any, respect was given to Bash's opinions or comments and that there was no fear of discipline in connection with his comments. They told him he did not think before he talked (R. 213); they accused him of being a raving maniac (R. 209) who was always hollering (R. 195, 175). Niemi demanded his discharge before his face (R. 147). Other of the strikers demanded his discharge

[35]Thus Jones testified to having stated to Bash, " 'You have been referring to me as a Communist and if you call me that I will attempt to answer that with violence.' " (R. 141).

in a meeting with McPherson (R. 198). His temper led the Trial Examiner to find that Bash was "of an excitable and undiplomatic temperament (R. 41).

B. THE STATEMENTS DID NOT VIOLATE THE ACT IN ANY EVENT.

In addition to this background, it is clear with respect to individual statements that they are protected under 8(c); thus great stress is placed upon statements during a telephone conversation between Bash and Pottle as to which the Board found there was an assurance of job security (R. 82) although Pottle had already gone on strike and testified that there was no suggestion that she come back to work (R. 220). Another statement was found to have a threat of force or reprisal (R. 82) although it was made in the course of a conversation with Pottle that Pottle described as being an apology for what had occurred (R. 214-15).

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of the rights" to self-organization, to form, join or assist labor organizations, etc. Employers have often been held to violate Sec. 8(a)(1) by threats based on anti-union animus. However, the test of threats and coercions is not objective, but subjective. The inquiry is a factual one, which must be based on the evidence. *Labor Board v. Mt. Clemens Pottery Co.,* 147 F.2d 262 (6th Cir. 1945). If in fact the statements were not threatening or coercive in their impact on the employee to whom they were addressed, then there is no violation of Sec. 8(a)(1). Ibid.

Section 8(c) provides that an expression of views, argument or opinion "shall not constitute or be evidence of an

unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." The Trial Examiner found that statements relied upon by the Board did not contain any threat of reprisal or force or promise of benefit (R. 42). The foregoing discussion clearly shows that this finding was correct and the Board's contrary finding is without support in substantial evidence on the record considered as a whole. Thus the Board's conclusion of a violation of 8(a)(1) by statements of Bash is based on evidence that cannot be considered and upon findings that are without support in the record.[36]

C. RESPONDENT DID NOT VIOLATE 8(a)(1) BY BASH'S STATEMENTS.

The Board has concluded solely from the statements of Bash that *respondent* interfered with and coerced its employees and that they establish a policy that respondent "would resort to any measure necessary to rid itself" of the ACA, that it "intended to discriminate against ACA members" and that it "intended to oust the ACA and discharge its adherents" (R. 82-83)

It is clear that all the statements relied upon by the Board, if they were made, were made by a minor supervisory employee while under great emotional stress and while his opinions and statements were being generally disregarded by all persons who the Board concludes were threatened or coerced by his statements. There is no basis in the evidence for suggesting that respondent thereby in-

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[36]The absence of evidence to support the Board's findings as to the nature of these statements is further demonstrated by its failure to consider the facts and the background and its substitution of references to other decisions involving other situations has its support for its purported findings (R. 82-3).

terfered with, restrained or coerced any person,—employe or not.

It is well settled that the Board is not at liberty to giv to isolated statements of a supervisory employee the effec of establishing a policy of a corporate employer. *Mary land Drydock Co. v. Labor Board,* 183 F.2d 538 (4th Cir 1950). "Isolated or casual expressions of individual views made by supervisory employees, not authorized by the employer and not of such character or made under circumstances reasonably calculated to generate the conclusion that they are an expression of his policy, fail to constitute interference with the employees in the exercise of their right of self-organization, within the intent and meaning of the Act." *Labor Board v. Fairmont Creamery Co.,* 144 F.2d 128, 129 (10th Cir. 1944).

In the instant case there is nothing whatever in the record to indicate that Bash's statements represented respondent's policy. The Board's characterizations of his words as establishing the motives and intentions of the corporate respondent are gratuitous and ridiculous (R. 82-83).

Furthermore there is nothing to show any authority in Bash to make any statement binding on respondent. *Labor Board v. Russell Mfg. Co.,* 187 F.2d 296 (5th Cir. 1951); *Labor Board v. Hinde & Dauch Paper Co.,* 171 F.2d 240 (4th Cir. 1948).

In many cases in the Courts of Appeals findings based on immeasurably greater evidence have been overturned, where the Board sought to fasten on employers responsibility for the views of supervisors. Thus in *Labor Board v. Reynolds Int'l Pen Co.,* 162 F.2d 680 (7th Cir. 1947) the Court refused to hold the corporate employer had violated

the Act even though its General Manager had made statements much similar to those made by Bash here. In *Labor Board v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946) the Court overturned a finding by the Board of coercion even though a number of supervisors had made anti-union statements over a 15-month period. And in *Labor Board v. J. L. Brandeis & Sons*, 145 F.2d 556 (8th Cir. 1944) a whole course of anti-union talk was held not violative of the Act, because it was not coercive in fact. Cf. *Labor Board v. Scullin Steel Co.*, 161 F.2d 143 (8th Cir. 1947).

Just as in the *Montgomery Ward* case, supra, the Board has made "insubstantial findings of fact screening reality" when it held that respondent would resort to any measures necessary to rid itself of ACA, and the like. The fact is that there was no evidence whatsoever in the record which would support any such conclusions; they are made out of whole cloth.

V.

The Omnibus Cease and Desist Order Must Be Denied Enforcement in Any Event

Paragraph 1(b) of the cease and desist order is a "boiler plate" provision that is frequently incorporated in Board decisions. Repeatedly the courts have stricken this paragraph, and this Court has denominated this paragraph as "all inclusive" and as "an omnibus cease and desist order."

The law of this circuit is clearly set forth in *Labor Board v. Kinner Motors, Inc.*, 152 F.2d 816 (9th Cir. 1946), involving the same paragraph although there numbered 1(c):

"1(c) of the order is all inclusive of the statement of

employee rights contained in § 7 of the Act. In our opinion such order is directly in conflict with the salutary statement of the Supreme Court in *National Labor Relations Board v. Express Publishing Company,* 312 U.S. 426 wherein it is said (p. 435), '* * * But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged * * *.'

"In *May Department Stores Co. v. National Labor Relations Board,* 326 U.S. 376 * * * it is held that an omnibus cease and desist order will not be approved unless there is a 'clear determination by the Board of an attitude of opposition to the purposes of the Act to protect the rights of employees generally.'

"The Board's order in this case is ordered amended by striking paragraph 1(c)."

The Board also struck any reference to this paragraph in the notice that was to be posted. To the same effect are *Labor Board v. Walt Disney Productions,* 146 F.2d 44 (9th Cir. 1944), cert. den. 324 U.S. 877; *Richfield Oil Corp. v. Labor Board,* 143 F.2d 860 (9th Cir. 1944); *Labor Board v. Gilfillan Bros., Inc.,* 148 F.2d 990 (9th Cir. 1945); *Labor Board v. National Biscuit Co.,* 185 F.2d 123 (3rd Cir. 1950); *Labor Board v. Lipshutz,* 149 F.2d 141 (5th Cir. 1945).

The Board's decision includes no finding of the type required by these cases.

Furthermore, the record affirmatively shows that the necessary findings could not be made in this case. This is true even if all the Board's findings were to be accepted.

They show very little; at most: (1) some employees were told that they were "discharged" or "fired" when they were on strike, and (2) some statements were made showing one individual's antipathy to the ACA and especially his personal opinion of Communist infiltration in the ACA.

Even the limited record made before the Board shows that respondent was recognizing the rights of its employees guaranteed by the Act. It repeatedly advised its employees that their rights under the Act would be respected and told them that respondent wished to bargain with whatever union was certified as soon as the Board would resolve this question (R. 222-223, 269-271). In other ways it frequently made it clear to its employees that their rights under the Act were protected (for example, R. 403, 404). True, a minor supervisor who had long been a member of the ACA clearly indicated his distaste for the ACA as it was operating in January of 1949. It is to be noted, however, that according to the finding of the Trial Examiner who heard the testimony and observed the witness and the reaction of the ACA workers, Bash's statements were equivocal and contained no threat of reprisal or force or promise of benefit, so as to render them inadmissible under section 8(c) of the Act (R. 40-42). Furthermore, even Bash said, while making one of the statements relied on by the Board, that he believed that unions were a good thing and that the company would have recognized the ACA, whether or not the leaders were communists, if they had just complied with the law and obtained certification by the Board (R. 371-372). Even Bash fully recognized the right of the employees to strike, for he told Wheeler and Guerrero, "I know you are going to make me reinstate Chuck Jones, now get down

there on the bricks [the picket line] with the rest of them and make me do it" (R. 378-379).

The record further shows that in this case the Board excluded the issue with respect to the facts on which an omnibus cease and desist order depends. Thus the Board struck the ninth defense of respondent (R. 126-27). It refused to consider evidence with respect to the long history of friendly collective bargaining relations between respondent and the ACA (R. 403, 404, 409), which continued up until the time that a question arose as to whether the ACA or the IBEW should be recognized, when the ACA refused to comply with the National Labor Relations Act and thus precluded settlement of the representation question (R. 268-70, 409-15). It even further narrowed its investigation with respect to respondent's general acceptance of the principles of the Act by declining to hear evidence regarding its relations with the representatives of its employees during the period from August, 1948, until January, 1949 (R. 277, 410-12). If the issue had been raised and was properly before the Board, it would have had to hear evidence on these issues before making findings. *Pacific Gamble Robinson Co. v. Labor Board,* 186 F.2d 106, 109 (6th Cir. 1950); *Labor Board v. Montgomery Ward & Co.,* 157 F.2d 486, 491-93 (8th Cir. 1946).

The record on which the Board relies thus shows that it refused to consider the issue and failed to make the findings necessary to support a paragraph such as 1(b). Under these circumstances we submit this Court's decisions in the *Kinner* and *Richfield* cases preclude enforcement of paragraph 1(b).

CONCLUSION

We have shown that the affirmative order should be denied enforcement and set aside. The crucial finding of fact on which the Board's affirmative order depends is not supported by substantial evidence on the record considered as a whole. The order is punitive rather than remedial. It is contrary to law because the strikers violated their obligations to work at the time and place they selected for their refusal to work. We have shown the portion of the order relating to the statements of Bash should be denied enforcement and set aside. No charge was filed with respect to this alleged unfair labor practice. The crucial findings of fact are not supported by substantial evidence on the record considered as a whole. The omnibus cease and desist order must be denied enforcement and set aside. The finding of fact required to support such an order has not been made by the Board. There is no basis for any such finding in the record. Even if these grounds for denying enforcement and setting aside the order did not exist, enforcement would have to be withheld, further evidence adduced, and the record reconsidered. The facts as to who filed the charges and the facts relating to the appropriateness of any affirmative relief, as well as facts respondent sought to submit with respect to the availability of the jobs to the strikers, would still have to be considered.

We respectfully submit that this Court should deny enforcement of the Board's order and set it aside in whole in accordance with Section 10(e) of the Act.

Respectfully submitted,

GREGORY A. HARRISON,
RICHARD ERNST,
MALCOLM T. DUNGAN,
BROBECK, PHLEGER & HARRISON,
Attorneys for Respondent.

San Francisco,
June 29, 1951.

Appendix

LABOR MANAGEMENT RELATIONS ACT, 1947

Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. * * *

FEDERAL COMMUNICATIONS ACT (47 U.S.C.)

Sec. 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; * * *

§ 217. **Agents' acts and omissions; liability of carrier.** In construing and enforcing the provisions of this chapter, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure

of such carrier or user as well as that of the person. *(June 19, 1934, c. 652, § 217, 48 Stat. 1077)*

§ 501. **General penalty**. Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both. *(June 19, 1934, c. 652, § 501, Stat. 1100)*

CALIFORNIA PENAL CODE

Sec. 638. Every agent, operator, or employee of any telegraph or telephone office, who willfully refuses or neglects to send any message received at such office for transmission, or willfully postpones the same out of its order, or willfully refuses or neglects to deliver any message received by telegraph or telephone, is guilty of a misdemeanor. * * *